No. 95

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 95

TALBOT JENNINGS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

Opinion Below

The Supreme Court of Illinois did not render any opinion, apart from the Order Dismissing Petition for Writ of Error, which is set forth in full at page 184 of the Record. The order reads in part as follows: "It is further considered by the Court that after having examined and reviewed the petition and record in the post conviction hearing the same is found to disclose no violation or denial of any substantial constitutional rights of the petitioner under the Constitution of the United States or of the Constitution of the State of Illinois, and the petition for writ of error on post conviction hearing is accordingly dismissed; also,

petitioner granted leave to withdraw petition and record, if requested."

Jurisdiction

The judgment of the Supreme Court of Illinois was entered March 23, 1951. (R. 184.) The petition for writ of certiorari was filed April 9, 1951 and was granted June 4, 1951. The jurisdiction of this Court rests on 28 U.S.C. Section 1257 (3).

Questions Presented

The broad question presented is whether the Illinois Supreme Court erred in holding that there was "no violation or denial of any substantial constitutional rights of the petitioner under the Constitution of the United States" resulting from the dismissal, without a hearing on the truth of the allegations, of a petition under the Illinois Post-Conviction Hearing Act which alleged (1) that petioner's coerced confession had been introduced in evidence at his trial and (2) that perjured testimony had been knowingly used by the prosecuting officials to aid in securing a conviction. Subsidiary questions are (1) whether adjudication of the claim of coerced confession at the original trial made the issues res judicata in the post-conviction proceedings and (2) whether failure to present the claim of perjury at the original trial constituted a waiver of that claim.

Statute Involved

The Illinois Post-Conviction Hearing Act (Ill. Rev. Stats., 1949, chap. 38, secs. 826-832, Smith-Hurd Illinois Annotated Statutes, chap. 38, secs. 826-832) is set forth in full in Appendix A.

Statement

On February 5, 1951, Talbot H. Jennings, the petitioner herein, filed *pro se*, in the Criminal Court of Cook County

an amended petition under the Illinois Post Conviction Hearing Act. (R. 7). According to the allegations of the petition, five police officers at 3:30 a. m. on June 6, 1948, acting without search or arrest warrants forced their way into the home of Mrs. Rosanna Watson and Miss Evelyn Jackson, at 5303 South Dearborn Street, Chicago, and arrested the petitioner. (R. 9). The officers then searched the house and when requested to show a search warrant, one of them replied that they did not need one. One of the officers searched petitioner's person and took from him a diamond ring and a wristwatch. When petitioner asked Mrs. Watson to obtain counsel for him, the petitioner was struck in the face by one of the arresting officers who said that notifying an attorney would do no good. (R. 9). The petitioner was then taken in a police car, after brief stops at two Chicago police stations, to the Oak Park Police Station in Oak Park, Illinois and was questioned on the way about a jewelry store robbery that had occurred in Oak Park on May 23, 1948. Upon arrival at the police station at about 5:30 a.m., June 6, 1948, petitioner was informed that he was arrested on suspicion of having participated in that robbery. (R. 9). When the petitioner denied any knowledge of the crime and attempted to produce evidence that he was in the City of Detroit at the time of the robbery one of the officers conducting the interrogation struck the petitioner in the face a number of times saying that he would make the petitioner confess to the robbery or kill him. (R. 9). Petitioner was then subjected to continuous questioning for several hours and was beaten when he continued to assert his innocence. (R. 9). The questioning and beating were temporarily suspended when a man, later identified as Mr. Sidney Barr, the owner of the jewelry store, was brought in to identify the petitioner. Mr. Barr first said that he could not identify the petitioner because he did not get a good look at the man who robbed him but

finally, under urging by a police officer, said that the petitioner, from the back, looked like the man who was in his store at the time that another man, referred to as Edgar Morgan, put a gun in his stomach and forced him to the rear of the store. (R. 12). The petitioner was then confronted with Edgar Morgan, who identified the petitioner as the man he had implicated in a statement made at the Oak Park Police Station. Morgan was then taken away and petitioner was again beaten and questioned continuously until he could no longer stand the abuse inflicted upon him by the police officers. Petitioner then agreed to sign anything the officers wanted him to sign to evade further mistreatment, and signed the statement that Morgan had made implicating him. (R. 13). After signing this statement the petitioner was taken to the River Forest Police Station, River Forest, Illinois and was kept there for two days and was brought back and forth to the Oak Park Police Station for further questioning and maltreatment. (R. 13). As the result of this interrogation and physical brutality the petitioner was in a dazed condition and suffering with pain from the injuries inflicted. He was not given any food or water until he signed a second joint statement in the Oak Park Police Station on the night of June 6, 1948. (R. 14). The petitioner was then returned to the River Forest Police Station where he was kept in secret detention until June 8, 1948, when he was brought back to the Oak Park Station and informed that an attorney had been retained to act in his behalf and that the attorney had instituted habeas corpus proceedings to have him located and released or a charge placed against him. (R. 14). A charge of armed robbery was then placed against the petitioner and he was locked up and held in the Oak Park lockup. Several days after his arrest petitioner was taken before a justice of the peace and was committed to the Cook County jail to await action by the Grand Jury. (R. 14-15).

On June 29, 1948, the Grand Jury returned an indictment against petitioner for robbery, (R. 27) and on July 6, 1948, the petitioner pleaded "Not Guilty." (R. 32). On the same day the case was continued until July 28. (R. 32-33). On July 28th, by agreement between the State's Attorney and petitioner's counsel, the cause was continued until August 13th. (R. 33). On August 13th the counsel for the petitioner submitted a motion to suppress evidence obtained by illegal search of the petitioner's person and of the premises at which petitioner was arrested. (R. 33). The evidence was described as "one gold ring and certain personal property, the exact description of which is unknown to the petitioner and which the said police officers intended to use in the above entitled cause as evidence against the petitioner." (R. 33). At the hearing for the motion to suppress, Detective Piotter, one of the officers making the arrest, testified that petitioner had been arrested in an apartment at 5303 Dearborn and that the arresting officers had gotten no personal property in the apartment when petitioner was arrested. (R. 60-61). On August 26, 1948, the Court overruled the motion to suppress evidence. (R. 33-35). After successive continuances, granted at the request of the State's Attorney on October 4, 1948 and November 4, 1948, and the overruling of a motion for discharge of the petitioner on account of the delay, the case was called for trial on December 23, 1948. (R. 35-36).

At the trial the prosecution offered in evidence both statements signed by the petitioner. Counsel for petitioner moved to suppress the statements on the ground that they had been obtained by third degree methods. At the hearing of this motion the petitioner testified, and also produced witnesses who testified, to the police brutality in extracting the confessions. Police officers testified to the contrary. The presiding judge overruled the motion and admitted the statements in evidence. (R. 15-16, 165-180).

At the trial evidence was also introduced by the prosecution with respect to a ring found upon the petitioner and identified by Mr. Barr as part of the jewelry stolen from his store. The same police officer, Detective Piotter, who had testified at the hearing on the motion to suppress evidence that no personal property was taken when the petitioner was arrested, testified at the trial that the ring was taken in the apartment from the petitioner when he was arrested. (R. 85; 118-119).

On January 12, 1949 the jury returned a verdict of "guilty", (R. 40) and on January 28, 1948 the petitioner was sentenced for a term of from ten (10) to twenty-five (25) years, which he is now serving. (R. 44). On the same day, motions for new trial and in arrest of judgment were presented and overruled. (R. 4-43).

In response to the petition under the Post-Conviction Act set forth above, the State's Attorney on behalf of the State of Illinois moved to strike the second amended petition and to dismiss the proceeding. The grounds advanced for this motion were: (1) that "the claims were conclusively adjudicated in full hearing to petitioner and decided against him, the claims therefore being res judicata and not within the jurisdiction of the court to hear or use as a basis for granting petitioner relief;" (2) that "the allegations of a denial of petitioner's constitutional rights are mere conclusions unaccompanied by affidavit of facts or documentary evidence having possible probative force sufficient to require an answer or hearing;" (3) that "the facts alleged by petitioner would not, if true, constitute a showing of a substantial denial of petitioner's constitutional rights in the proceedings which resulted in his conviction." (R. 180-181).

On November 1, 1950, the Court, after hearing argument on the motion to dismiss, entered an order dismissing the

petition. (R. 18). On February 5, 1951, the petitioner filed a Petition for Writ of Error in the Supreme Court of Illinois accompanied by motion for leave, because of poverty, to file typewritten copies of brief and abstract in lieu of the requisite number of printed copies required by Rule 40 of that court. (R. 1-6). On March 23, 1951, the Supreme Court of Illinois issued an order allowing the petitioner's motion to sue as a poor person and dismissing the Petition for Writ of Error. (R. 184).

Summary of Argument

1. The petition presented so clear and substantial a claim of denial of due process through use of coerced confessions that the order of the Illinois Supreme Court must have been intended as a holding that such a claim could not be presented in the post-conviction proceedings. Since, however, the decision avowedly rests on federal rather than state law, it can be supported only on the theory that as a matter of federal law such a claim could not be presented in a collateral attack upon an adjudication made at the original trial. This ground of decision, if it can be treated as a matter of federal law at all, must be tested by consideration of the right to present in federal habeas corpus proceedings claims of denial of constitutional right which have been determined at the original trial. The decisions of this Court show that there is no absolute bar to the readjudication of such claims in habeas corpus proceedings, and also support the proposition that such readjudication is appropriate whenever there was no adequate opportunity to secure direct review of the determination of constitutional right in the original trial. It is particularly important that such collateral attack be permitted in the case of state court determinations when there is no opportunity for direct review, since, otherwise, there would be no way to secure federal vindica-

tion of the federal rights asserted. This petitioner did not have an adequate opportunity for direct review with respect to his claim of coerced confession because a transcript of the evidence at the trial would have been required in order to present it by way of writ of error, and Illinois does not provide any way in which an indigent defendant, such as this petitioner, may obtain the transcript without cost to himself. Consequently, the claim of denial of constitutional right through use of coerced confessions would have been available to petitioner in federal habeas corpus proceedings, if there were no Illinois post-conviction remedies available. Since the Illinois Supreme Court apparently assumed as the basis for its decision that such a claim of federal right would not have been available in federal habeas corpus proceedings, its order should be reversed with directions to grant a hearing on the merits of the allegation in the post-conviction proceedings, unless such a hearing is unavailable as a matter of state rather than federal law.

2. The petition also presented a clear and substantial claim of denial of due process through the knowing use by the prosecuting officials of perjured testimony which contributed substantially to petitioner's conviction. This perjury occurred on petitioner's motion to suppress illegally seized evidence, when one of the arresting officers testified that no property had been taken from the petitioner at the time of the arrest. On the basis of this testimony the State's Attorney secured a denial of the motion to suppress without any consideration of its merits. Yet the same State's Attorney at the time of the trial presented as one of the State's exhibits a ring which the same police officer then testified had been taken from petitioner at the time of his arrest. Thus, the State's Attorney and the police officer by the knowing use of perjured testimony deliberately deprived the petitioner of an opportunity to se-

cure the benefit of state law, which provides for the suppression of illegally obtained evidence. Such dishonest conduct on the part of the prosecuting officials, which contributed materially to petitioner's conviction, was a denial of due process within the applicable rulings of this Court. This claim of denial of due process has never been litigated before or presented to any court for adjudication. The failure of the petitioner to present this claim of denial of due process at the time of the original trial can not reasonably be construed as a waiver, and there is no indication that it was so construed by the Illinois Supreme Court.

ARGUMENT

I. The Illinois Supreme Court erred in holding that the allegations of the petition with respect to the use of coerced confessions did not, as a matter of federal law, set forth a substantial claim of denial of federal right entitling petitioner to a hearing on the truth of the allegations.

A. *The order of the Illinois Supreme Court can be sustained only if, as a matter of federal law, the principle of res judicata justified the denial of a hearing on the truth of the petitioner's allegations with respect to the coerced confessions.*

The original petition in this proceeding makes clear and specific allegations with respect to the extraction and use of involuntary confessions for the purpose of obtaining a conviction. These allegations are also supported by two affidavits by friends of the petitioner to the effect that they visited him shortly after his detention and saw evidences of the brutality to which he had been subjected. (R. 63-64). There can be no doubt that there is thus presented a substantial claim of denial of federal right within the applicable rulings of this Court. *Brown* v. *Mississippi*, 297 U. S. 278;

Chambers v. *Florida*, 309 U. S. 227; *White* v. *Texas*, 309 U. S. 631; *Canty* v. *Alabama*, 309 U. S. 629; *White* v. *Texas*, 310 U. S. 530; *Vernon* v. *Alabama*, 313 U. S. 547; *Lisenba* v. *California*, 314 U. S. 219; *Ward* v. *Texas*, 316 U. S. 547; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Haley* v. *Ohio*, 332 U. S. 596; *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68. As against the motion to dismiss interposed by the State's Attorney, these allegations were entitled to acceptance at their face value. *Hawk* v. *Olson*, 326 U. S. 271, 278-279; *House* v. *Mayo*, 324 U. S. 42, 45; *Williams* v. *Kaiser*, 323 U. S. 471, 473-4; *Cochran* v. *Kansas*, 316 U. S. 255, 256-7; *Walker* v. *Johnston*, 312 U. S. 275, 285; *Johnson* v. *Zerbst*, 304 U. S. 458, 468; *Moore* v. *Dempsey*, 261 U. S. 86, 92. This claim of denial of due process through the use of coerced confessions was fully preserved in the petition for writ of error to the Illinois Supreme Court, in which petitioner alleged that confessions obtained by force, violence and illegal detention were used to obtain his conviction and that "his constitutional rights were violated under Art. 11, secs. 2, 6, 9, and 10 of the Illinois Constitution and under the 4th, 5th, 6th and 14th Amendments of the United States Constitution." (R. 3). In view of these allegations, it is apparent that the petitioner set forth substantial claims of the denial of federal right with respect to the use of coerced confessions and that the Illinois Supreme Court in dismissing the petition for writ of error on the ground that it found "no violation or denial of any substantial constitutional rights of the petitioner under the constitution of the United States" denied the validity of that federal claim.

The allegations of the petition with respect to the coerced confessions present so clear a case of a substantial claim of denial of due process that it is scarcely conceivable that

the Illinois Supreme Court meant that these allegations, taken by themselves, did not state a substantial claim of federal right. The more reasonable interpretation of the court's ruling is that those allegations, in the light of the fact that the same claim had been made at the original trial and decided against the petitioner, did not as a matter of constitutional right entitle the petitioner to another hearing upon the same issue. This analysis is consistent with the ground urged by the State's Attorney in his motion to dismiss, namely that the issue presented was res judicata (R. 180) and with the statement of the Attorney General in response to the petition for certiorari that the petition did not demonstrate that the questions presented "were not fairly tried and therefore conclusively adjudicated at his trial." It is also consistent with the opinion of the Illinois Supreme Court in *People* v. *Dale*, 406 Ill. 238, sustaining the validity of the post-conviction statute, in which the court said: "The remedy provided for under the Act cannot be employed to obtain another hearing upon claims of denial of constitutional rights as to which a full and final hearing on the merits has already been held". (406 Ill. at 244).[1]

It is true that the opinion of the Illinois Supreme Court in the *Dale* case also indicates that, irrespective of federal law, Illinois law might prevent the reconsideration in post-conviction proceedings of constitutional issues presented in the original trial. However, it is clear from the language of the order that the ruling of the Illinois Supreme Court in the present case in rejecting the claims of federal right, put aside the considerations of state law suggested in the *Dale* opinion which might have served as the grounds of decision and rested instead on its own conception of federal law. It is, therefore, immaterial that the ruling might have

[1] Other opinions of the Illinois Supreme Court under the Post-Conviction Hearing Act are *People* v. *Hartman*, 408 Ill. 183; and *People* v. *Farley*, 408 Ill. 288.

been rested upon state law had the Illinois court chosen such grounds. See *Steele* v. *Louisville and Nashville R. R.*, 323 U. S. 192, 197 n. 1. Thus it seems fair to assume, for the purposes of this discussion, that the ruling of the Illinois Supreme Court rests upon the proposition that, as a matter of federal law, the determination in the original trial that the confession was properly admissible, renders that question res judicata for the purpose of any other proceedings attacking the conviction as one obtained without due process of law. If there is any doubt about the correctness of this assumption, the petitioner is at the very least entitled to a reversal of the judgment below with directions to clarify the basis of decision.

If, however, our interpretation of the Illinois Supreme Court's ruling is correct, the judgment can be sustained only if dismissal of a federal habeas corpus proceedings would have been justified had the same claim of denial of federal right been presented in such proceedings in the absence of any available state remedies. For either (1) the concept of res judicata, where applied by a state court to foreclose a constitutional issue, must be treated entirely as a matter of state law, or (2) it must be governed by the same principles which are controlling in federal courts with respect to comparable problems. If the first alternative is correct, it would follow almost automatically that the ruling of the Illinois Supreme Court would have to be reversed, because it avowedly rests upon federal rather than state law, and there is no principle of federal law, other than some concept of res judicata, which could conceivably support the judgment. If, on the other hand, the second alternative is correct, the soundness of the Illinois Supreme Court's decision must be tested by the extent to which the principle of res judicata has been applied to the presentation of comparable claims of denial of federal right in federal habeas corpus or other post-conviction proceedings. We turn therefore

to an examination of the application of the principle of res judicata in such proceedings.

B. *The determination of the issue of coercion at the original trial did not, under federal law, justify the application of the doctrine of res judicata in the absence of a real opportunity for direct review by this Court of the determination in the original trial.*

Examination of the decisions of this Court regarding federal habeas corpus proceedings suggests immediately that there is in federal law no hard and fast rule justifying the application of the principle of res judicata to foreclose consideration on their merits of constitutional claims of deprivation of liberty without due process of law. Indeed, if there is any general rule to be deduced from the decisions, it points in exactly the opposite direction. Without going so far as to suggest that a prior determination on the particular issue in the original proceedings may not be a relevant or significant factor, it may at least confidently be asserted that its significance may be qualified or entirely neutralized by other relevant circumstances making opportunity for collateral attack in the habeas corpus proceedings necessary or appropriate to the ends of justice.

For example, in *Frank* v. *Mangum*, 237 U. S. 309, the opinion of the Court rejected "the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort." (p. 334). The dissenting opinion of Mr. Justice Holmes made the point all the more explicit when he said: "It is significant that the argument for the State does not go so far as to say that in no case would it be permissible on application for habeas corpus to overrule the findings of fact by state courts. It would indeed be a most serious thing

if this Court were so to hold, for we could not but regard it as a removal of what is perhaps the most important guaranty of the Federal Constitution." (p. 348). And in *Moore* v. *Dempsey*, 261 U. S. 86, the very grounds adopted by this Court in a habeas corpus proceeding as the basis for its finding of violation of due process had also been unsuccessfully pressed upon the trial court in a motion for a new trial, upon the State Supreme Court as grounds for appeal, and finally upon this Court in a petition for certiorari. Indeed the position taken by the dissent in *Moore* v. *Dempsey* was that the "solemn adjudications by courts of a great state" which this Court had refused to review, could not "be successfully impeached by mere ex parte affidavits made upon information and belief . . ." (p. 102).

It is true that in *Moore* v. *Dempsey* the constitutional claim was that the entire trial was a sham because of the spirit of mob domination that pervaded it. But that is not the only type of case in which this Court has permitted collateral attack to present an issue of denial of constitutional rights. Such attack has been permitted when the constitutional issue presented was double jeopardy (*In re Snow*, 120 U. S. 274; *Hans Nielsen, Petitioner*, 131 U. S. 176); self-incrimination (*Counselman* v. *Hitchcock*, 142 U. S. 547); denial of counsel (*Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275); lack of jurisdiction over the subject matter (*Bowen* v. *Johnston*, 306 U. S. 19); use by prosecutor of testimony known to be perjured (*Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213); inducing prisoner to plead guilty by means of misrepresentation (*Smith* v. *O'Grady*, 312 U. S. 329); inducing prisoner to plead guilty by means of coercion (*Waley* v. *Johnston*, 316 U. S. 101); suppression of testimony favorable to defendant (*Pyle* v. *Kansas*, 317 U. S. 213); deprivation of trial by jury (*Adams* v. *United States ex rel. Mc-*

Cann, 317 U. S. 269). In some of these cases the issue had already been adjudicated in the original proceedings and in others not, but the underlying principle of them all is as Chief Justice Hughes indicated in *Bowen* v. *Johnston*, *supra*, that "if it be found that the court had no jurisdiction to try the petitioner or that in its proceedings his constitutional rights have been denied, the remedy of habeas corpus is available . . . ." (306 U. S. at 24). And in *Sunal* v. *Large*, 332 U. S. 174, where the writ was denied on the ground that it could not do service for an appeal, the opinion of the Court was careful to distinguish the principle of the foregoing cases on the ground it was not applicable "where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court" and to point out that the error complained of did not rise to constitutional proportions because it did not "infect the trial with lack of procedural due process" (p. 182).

There is scarcely need to emphasize here the seriousness with which this Court has regarded the infection resulting from the use of a coerced confession as the means of obtaining a conviction. In *Brown* v. *Mississippi*, 297 U. S. 278, 286, Chief Justice Hughes, in sweeping aside the contention of the state that the objection had not properly been presented at the trial, said: "The complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." (Citing *Moore* v. *Dempsey*). Similarly in *Lisenba* v. *California*, 314 U. S. 219, Mr. Justice Roberts, speaking for this Court, said:

> "A trial dominated by mob violence in the courtroom is not such as due process demands. The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession.
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> "If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State,

the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used in the trial.

"The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence". (p. 237)

Plainly under the views consistently expressed by this Court, the use of a coerced confession is as abhorrent to the fundamentals of due process and as fatal to the validity of the trial as the facts set forth in *Moore* v. *Dempsey*, or any other case where collateral attack has been permitted through habeas corpus proceedings in the federal courts. It is true that most of the coerced confession cases have come to this court by way of direct appeal rather than by way of habeas corpus or some other post-conviction remedy. However, that has not been uniformly so (cf. *Chambers* v. *Florida*, 309 U. S. 227) [2] and there is nothing in the opinions of this Court to suggest that in an appropriate case the same issue might not properly be presented collaterally in some form of post-conviction proceedings. Indeed, the very fact that this Court has set aside state convictions on the grounds that coerced confessions were admitted in evidence, even though that issue had been thoroughly and dispassionately considered by the state court, indicates that such admission is itself a denial of due process irrespective of the judicial temper pervading the trial.

One can only conclude, therefore, that the alleged use of

[2] The State Supreme Court in *Chambers* v. *State*, 111 Fla. 707, granted leave to apply for a writ of error coram nobis on the basis of allegations that the petitioners were too ignorant and frightened to tell their attorneys, or to testify, that their confessions were not voluntary.

a coerced confession to secure a conviction is a claim of denial of constitutional right for the vindication of which, in an appropriate case, the remedy of habeas corpus is as much available as for any other deprivation of liberty without due process of law. What is an appropriate case for the issuance of the writ to protect this particular constitutional right is to be determined by the same general principles invoked by Chief Justice Hughes in *Bowen* v. *Johnston, supra:*

> "It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. *Ex Parte Lange, supra.* The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. It has special application where there are essential questions of fact determinable by the trial court. *Rodman* v. *Pothier, supra.* It is applicable also to the determination in ordinary cases of disputed matters of law whether they relate to the sufficiency of the indictment or to the validity of the statute on which the charge is based. *Id.; Glasgow* v. *Moyer, supra; Henry* v. *Henkel, supra.* But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent" (306 U. S. at 26-27).

The most fully considered opinion, with which we are familiar, on the application of these general principles to the particular question of a coerced confession is that of Judge Fahy in *Smith* v. *United States*, 187 F. 2d 192. There Judge Fahy pointed out the apparent conflict between "on the one hand Supreme Court opinions stating that

habeas corpus is available to correct the denial of any constitutional right, and on the other hand, the decisions of the courts of appeals that convictions based on coerced confessions cannot for that reason alone be set aside on collateral attack by the habeas corpus procedure" (p. 197),[3] He suggested that reconciliation of these two apparently opposing views might perhaps be found "in the proper application of the principles so clearly set forth in *Sunal* v. *Large* . . . that habeas corpus cannot be substituted for an appeal . . .". From this he concluded that "Where the alleged error of the trial court is in the admission of evidence subject to correction on appeal, and there is representation by counsel, habeas corpus is not the appropriate remedy." But Judge Fahy was careful to add that "Such admission alone does not result in the denial of a constitutional guarantee so long as the error is subject to correction on an appeal and there is no indication of any deterrent to an appeal such as lack of counsel."

With this analysis of Judge Fahy we have no funda-

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[3] Cases involving federal prisoners are apparently uniform in holding that the coerced confession issue may not be relitigated in habeas corpus proceedings. *Burall* v. *Johnson*, 134 F. 2d 614; *Miller* v. *Hiatt*, 141 F. 2d 691; *Eury* v. *Huff*, 146 F. 2d 17; *Cash* v. *Huff*, 142 F. 2d 60; *Smith* v. *United States*, 187 F. 2d 192. However, in cases involving state prisoners, federal courts appear to follow a more flexible approach. In *Sharpe* v. *Commonwealth of Kentucky*, 135 F. 2d 974, all of the evidence pertaining to the involuntary character of the confession was submitted to the jury at the trial in the state court, which determined the issue adversely to the prisoner. No appeal was taken from the verdict and judgment. On petition for habeas corpus, the federal district court took exhaustive evidence of the facts and circumstances relating to the allegedly coerced confession, but made no findings on this issue and dismissed the petition on the ground that the issue could not be properly raised in habeas corpus proceedings. *Ex Parte Sharpe*, 36 F. Supp. 386. The Court of Appeals reversed and remanded the case to the district court to report its findings. 135 F. 2d at 977. Subsequently the district court filed findings of law and fact, and found that the coerced confession claim was not sustained by the evidence. The Court of Appeals affirmed, 142 F. 2d 213. Compare *Schramm* v. *Brady*, 129 F. 2d 108.

mental disagreement. It is consistent with the opinion of Mr. Justice Van Devanter in *Salinger* v. *Loisel*, 265 U. S. 224, when he said: "Among the matters which may be considered and even given controlling weight are: (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application." (p. 231.) It is also consistent with the many cases in which this Court has held that habeas corpus was not available as a remedy for an alleged denial of constitutional right in state courts when all available remedies by way of direct appeal in the state courts and application for review by this Court had not been exhausted. (See cases cited in *Darr* v. *Burford*, 339 U. S. 200, 206, notes 15, 16 and 17.) When review by this Court was available as a matter of right, the logical corollary to such a holding was that the particular constitutional claim could never be presented by way of collateral attack in habeas corpus proceedings in the lower federal courts unless there were unusual circumstances justifying failure to exhaust available state remedies. Whether the same principle should still apply and, if so, to what extent the same conclusion should follow, was the subject of considerable discussion and division of opinion in *Darr* v. *Burford, supra*. But as both the majority and dissenting opinions in the *Darr* case make absolutely clear, the underlying assumption of all these cases is that the controlling considerations are grounded in comity rather than res judicata; and there is not the slightest room for doubt that, in the absence of opportunity for direct review by this Court, the determination of constitutional issues in state court criminal proceedings would be subject to collateral attack in habeas corpus proceedings in the federal courts. If the result were otherwise, the state court determination of a federal constitutional question would be final; and, despite the theoretical availability of habeas corpus, there would

be no opportunity to secure federal protection against the violation, in such state proceedings, of the constitutional right not to be deprived of liberty without due process of law. It is with such controlling considerations in mind that we turn next to an examination of the question whether there was in fact available to this petitioner such opportunity for direct review by this Court of the alleged denial of constitutional right as would have justified a lower federal court in dismissing a petition for habeas corpus in the absence of any state post-conviction remedies.

C. *The failure of the State of Illinois to provide any method by which petitioner could obtain, without cost to himself, a transcript of the testimony at the original trial was an effective deterrent to appeal sufficient to render the doctrine of res judicata inapplicable.*

As the opinion of Judge Fahy makes so clear, if the availability of an adequate appellate remedy is at least one of the keys to the determination of when constitutional questions are open to readjudication in habeas corpus proceedings, it is a real and not merely theoretical opportunity for appeal that must be available. But as a matter of harsh reality, there was no way in which this petitioner could have presented by way of appeal and then certiorari to this Court the soundness of his claim that he had been denied due process by admission of coerced confessions. The basis for this suggestion is the failure of Illinois to provide any means by which an indigent defendant may obtain a transcript of the evidence in his trial for the purposes of appeal without himself bearing the costs of transcription, unless the death sentence has been imposed. Ill. Rev. Stats., ch. 37, sec. 163(b); ch. 38, sec. 769(a). If the petitioner herein had sought a writ of error, the only record which would have been available to him substantially without cost would have been the common law record which

would have been insufficient to present the claim of denial of due process through the use of coerced confessions.[4] As the petitioner's motion for leave to proceed as a poor person in the original proceedings herein makes clear, petitioner has not, even up to the time when these proceedings were instituted, had the means to procure "the complete records necessary materially to aid in proving all of the allegations made in his petition." (R. 8.) The petition also shows that the petitioner has not heretofore sought relief by any other remedies. (R. 8.) It is, therefore, apparent, both from the specific allegations referred to above and the general tenor of the entire petition, that the petitioner is one of those who would be substantially affected by the absence of any provision whereby the record might be secured at the expense of the state. Although petitioner does not allege that he tried to get the transcript of evidence without cost, the law of Illinois on this question is so clear and so generally well understood by the Illinois bar that petitioner could hardly be required to do so futile an act.

This Court is no stranger to the limited character of the

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[4] Under the Illinois practice, according to the rules of the Illinois Supreme Court, adopted pursuant to statutory authority, review of a criminal conviction by way of writ of error is in general governed by the rules applicable to appellate review in civil cases. Ill. Rev. Stats., ch. 110, sec. 259.28; ch. 38, sec. 747. The notice of appeal must thus be filed within ninety (90) days after the entry of the judgment. Ill. Rev. Stats., ch. 110, sec. 259.34 (1) (a). In criminal cases "the bill of exceptions, or the report of the proceedings at the trial . . . shall be procured by the plaintiff in error and submitted to the trial judge or his successor in office for his certificate of correctness, and filed in the trial court within one hundred (100) days after the judgment was entered, or within such period thereafter as shall, during such one hundred (100) days, be fixed by the court, or in such further time as may be granted within any extended time." Ill. Rev. Stats. ch. 110, sec. 259.70A. At the time of Jenning's conviction, the bill of exceptions had to be filed within fifty (50) days after judgment was entered. The rule was amended, effective March 1st, 1950, to allow 100, instead of 50, days. Smith-Hurd Ill. Ann. Stats., Ch. 110, sec. 259.70A.

review which is available in the Illinois Supreme Court upon the common law record. *Carter* v. *Illinois*, 329 U. S. 173; *Foster* v. *Illinois*, 332 U. S. 134. This Court has also indicated its assumption that there must be some proceedings available either in the Illinois courts or the federal courts through which a more penetrating review of criminal proceedings in the Illinois courts may be obtained and through which other constitutional claims may be presented. 329 U. S. at 179, 332 U. S. at 139. It is also apparent that the petitioner's claim that he was denied due process through use of coerced confessions could only be adjudicated on the basis of all the evidence relating to that issue. Irrespective of the extent to which this Court should accept, or substitute its own judgment for, the judgment of the highest court of the State with respect to the voluntary or coerced nature of a confession, there must be first available a record upon which the judgment of either the state court or this Court may be predicated. Thus denial of the record to this petitioner effectively precluded him from obtaining the judgment of the highest court of the state upon this question; and if there is no other way of litigating the question, it would also preclude him from ever obtaining the benefit of any federal protection whatsoever from the principle so consistently announced by this Court that the use of a coerced confession for the purpose of obtaining a conviction is a denial of due process.

The significance of the cost of obtaining a transcript of the evidence as an effective bar to an appeal is attested by the federal statutory provisions (28 U. S. C. A. 1915, 63 Stat. 104), as well as the statutory provisions of at least 31 states, making such transcript, or an adequate substitute, available without cost to indigent defendants for purposes of appeal in criminal cases[5] (See Appendix B). In Eng-

[5] A 32nd state, Vermont, makes such relief available when the sentence is death or imprisonment for ten years or more. Two others, New Jersey and Pennsylvania, somewhat like Illinois, provide such relief in cases

land also provision is made for paying the cost of transcription of shorthand notes of the trial for the use of the Court of Criminal Appeal out of moneys provided by Parliament. The Criminal Appeal Act 1907, 7 Edw. VII, c. 23, § 16. Indeed Illinois itself recognizes the importance of this factor in providing by statute that where the death sentence has been imposed an indigent defendant may obtain the record without cost. Ill. Rev. Stats., ch. 38, Sec. 769(a). It is also noteworthy that the American Law Institute Code of Criminal Procedure adopted in 1930 provided that all appeal papers, including a transcript of the stenographic reporter's notes, should be transmitted by the clerk of the trial court to the appellate court without charge to the appellant. Amer. L. Institute, Code of Criminal Procedure (1931) S. 447. Thus there is ample evidence, in addition to the facts shown in this record and in the record in the companion case of *La Frana* v. *Illinois* (La Frana Record p. 49), indicating the significance of the cost of obtaining the record as an effective bar to appeal in criminal cases.

So far as we have been able to discover, the only decisions of this Court which might be regarded as somewhat contrary to the contention presented here are *Markuson* v. *Boucher*, 175 U. S. 184 and *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13. In the *Markuson* case, the petitioner filed in the federal district court a petition for habeas corpus for release from custody under sentence of the state court, after having unsuccessfully appealed to the Supreme Court of the State. In support of his petition he alleged that "he was in straightened circumstances and without means or power to prosecute a writ of error from the Supreme Court of the State to the Supreme Court of the United States, or to employ counsel to present or argue it there,

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where the conviction is for first degree murder or the sentence is death. Two of the states, Tennessee and Virginia, permit a narrative bill of exceptions in place of the transcript. For an earlier collection of statutes on the same subject, see Amer. L. Institute, Code of Criminal Procedure (1931), pp. 1266-1273.

and he is informed and believes that if he had such means it could not be brought on for hearing before the expiration of his sentence" (p. 185). This Court affirmed the denial of the petition upon the basis of the general rule that "after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this Court" (p. 186). The Court also added in apparent reference to the excuses offered by the petitioner for his failure to seek a writ of error, "The case at bar presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons." The circumstances suggested, it should be noted, were hardly comparable to those presented here, since they did not relate to any special burdens arising out of the particular state procedure, but to the burdens inherent in any application for the writ of error from this Court.

In the *Tyler* case the petitioners had instituted proceedings in the Peacemaker's Court (a special court established by state law) to gain possession of certain property and to set aside the probate of a will. They were successful in the court of first instance, but the Supreme Court of the state issued an order forbidding any further proceedings in the Peacemaker's Court. In the face of this order the petitioners secured the issuance of a mandate from the Peacemaker's Court and undertook to carry it into effect. For this they were adjudged in contempt of the State Supreme Court and sentenced to pay a fine, with imprisonment as the alternative. Upon failure to pay the fine they were committed to jail, and thereupon sought a writ of habeas corpus in the federal district court for their release. Again this Court held that there were no exceptional circumstances to justify departure from the general rule that all appellate remedies must be exhausted, before recourse to habeas corpus in the federal courts. This Court also noted that

there had been a suggestion in the opinion of the court below that "the relators pleaded lack of ability to bear the expense of proceedings for their protection in the state courts or to furnish bonds required on appeal." 269 U. S. at 19. This suggestion was disposed of with the remark: "We are unable to find anything in the record to support this claim, but even if it were true it would afford no basis for a different conclusion" (p. 19). Here again there was no indication of any specially burdensome characteristic of state procedure as compared with federal procedure. Furthermore, the petitioners had themselves invoked the jurisdiction of the state courts. It is no wonder then that this Court said: "Under these conditions, contemners, deliberately having taken the risk of setting at defiance the judgment of the state court, must look for redress, if they are entitled to any, to the appropriate and authorized appellate remedies" (p. 19).

Nevertheless, although the *Markuson* and *Tyler* cases are thus clearly distinguishable on their particular facts, it would be captious to deny that they have apparently been understood by some lower federal courts as supporting the general proposition that the costs of appeal and the inability of the petitioner to bear them are irrelevant circumstances in determining whether a petition for habeas corpus should be entertained.[6] But far more consistent with the more recent decisions of this Court is the holding of the Court of Appeals for the Seventh Circuit that the facts that the petitioner was "without means of hiring counsel and of paying for a record for use in perfecting an appeal from

[6] See *United States ex rel. Rheim* v. *Foster*, 175 F. 2d 772, at 773; *Ex Parte Stonefield*, 36 F. Supp. 453, at 456; *Ex Parte Sharpe*, 36 F. Supp. 386 at 388. (See note 3, p. 18, *supra*). The latter case was subsequently reversed and remanded, 135 F. 2d 974, on the ground that the court had erroneously held that the adjudication in the state courts of the petitioner's claim of coerced confession barred federal courts from reconsidering this issue in habeas corpus proceedings.

the judgment dismissing his petition for writ of error coram nobis," were sufficient to excuse any further exhaustion of state remedies by way of appeal. *Potter* v. *Dowd*, 146 F. 2d 244, 247. This holding in the *Dowd* case bears out the essential soundness of Judge Fahy's rationale in the *Smith* case that lack of counsel is only one illustration of the kind of difficulties that may make the opportunity for appeal so theoretical as to justify its disregard in determining whether habeas corpus is the appropriate remedy. Cf. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274-275. Surely this Court would not take the position that irrespective of how high the State might place the costs of appeal, exhaustion of such remedies would still be required as a condition of recourse to the federal courts for vindication of constitutional rights. The rule requiring exhaustion of state remedies is based on realistic appraisal of the importance of federal protection of federal constitutional rights as against the desirability of avoiding unnecessary interference with the processes of state courts by the federal courts. But respect for the latter consideration has not yet been carried to the extreme of sacrificing entirely the latter. In striking a proper balance certain considerations are not taboo merely because they relate to matters so mundane as the costs of justice and the poverty of the prisoner. And such considerations are particularly relevant in coerced confession cases, for as this Court has noted, "they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless." *Chambers* v. *Florida*, 309 U. S. 227, 238.

Indeed it might well be thought that the cost of the record is a more onerous burden to place on the indigent defendant even than the cost of counsel, for counsel may sometimes be dispensed with, or secured on a voluntary basis without the

aid of the court, while the record is an indispensable requirement for direct review of constitutional questions such as the one here involved. In making this suggestion, we are not unmindful of the fact that the federal statute making the transcript of evidence available without charge in an *in forma pauperis* proceeding is of a relatively recent origin and that even now the opportunity to proceed thereunder is customarily referred to as a statutory privilege rather than a constitutional right. But our contention is not that there is any constitutional right to an appeal, much less to an appeal *in forma pauperis*. We are dealing only with the question of when res judicata is properly asserted as a bar to adjudication of an otherwise valid claim of deprivation of life or liberty without due process of law. The only convincing reason we have found suggested in federal jurisprudence for acknowledging such a bar, short of final adjudication by this Court, has been the availability of direct appeal (as distinguished from collateral attack) for obtaining such an adjudication. We submit that when that direct road is in fact closed, by circumstances within the control of the state but outside the control of the petitioner, then the justification for accepting such a plea in bar fails and other available avenues for vindication of constitutional right may properly be pursued.

As indicated above, the foregoing argument is presented on the assumption that the same considerations which govern the application of res judicata to the assertion of constitutional claims in federal habeas corpus proceedings are also applicable to the assertion of constitutional claims in state post-conviction proceedings. In making this assumption we recognize that the Illinois Supreme Court, even though its present judgment is explicitly based on federal grounds, might nevertheless in subsequent proceedings hold that, as a matter of state law, different considerations

are applicable and that the constitutional claim here presented is not open in Illinois post-conviction proceedings, irrespective of what might be the applicable rule in federal post-conviction proceedings. Cf. *Williams* v. *Kaiser*, 323 U. S. 471, 479. It is generally understood, however, that the Illinois Post-Conviction Hearing Act was passed in response to the opinion of this Court in *Young* v. *Ragen*, 337 U.S. 235, indicating that unless the confusion with respect to post-conviction remedies in Illinois was cleared up the way would be opened to habeas corpus proceedings in the federal courts. See Jenner, *The Illinois Post Conviction Hearing Act*, 9 F.R.D. 347. The statute was apparently intended by its sponsors to provide an adequate remedy for the same claims of federal right that would have been recognized in habeas corpus proceedings in the federal courts. While the Illinois Supreme Court has not as yet expressly adopted this view, neither has it expressly taken a contrary position. The order issued in the instant case apparently proceeded on the assumption that the petition set forth no facts establishing a claim of federal right on which petitioner was entitled to a hearing. As indicated above, we believe that this was based on an erroneous view of federal law. If that error is made clear in an opinion of this Court, it is quite likely that the Illinois Supreme Court would find no insurmountable barrier to the granting of a hearing under the post-conviction statute. Cf. *State ex rel McManamon* v. *Blackford Circuit Court*, 95 N. E. 2d 556.

If the Illinois Post-Conviction Hearing Act may be interpreted so as to afford a remedy commensurate with federal habeas corpus, the Illinois Supreme Court should be given the opportunity to adopt such an interpretation in the light of an opinion of this Court removing any doubt as to the extent of the federal right at stake, before the way is opened to federal proceedings. If, on the other hand,

the remedies provided under the Illinios Post-Conviction statute are indeed insufficient to provide a suitable substitute for habeas corpus, this petitioner and other petitioners in a similar position, some of whom have been riding the Illinois merry-go-round of post-conviction remedies for some time, should learn this without any further unnecessary delay. Certainly the cryptic order of the Illinois Supreme Court in this and similar cases fails to do justice either to the constitutional rights asserted by the petitioner or the considerations of comity underlying the requirement of exhaustion of state remedies before resort to the federal courts. Therefore, the order of the Illinois Supreme Court should be reversed with directions to permit a hearing on the truth of the petitioner's allegations regarding the coerced confessions unless, as a matter of state law, no such remedy is available.

II. The Illinois Supreme Court erred in holding that petitioner was not entitled to a hearing on the truth of his specific and substantiated allegations that the prosecuting officials by knowing use of perjured testimony denied him due process of law.

The petition originating these proceedings also presented a federal constitutional claim of substantial and independent merit concerning the knowing use by prosecuting officials of perjured testimony. The petition, although prepared *pro se*, states clearly and specifically that "the petitioner was denied due process of law and was convicted with the use of false testimony willfully, corruptly and falsely given to mislead the Court by a witness for the State, Det. Edward Piotter. And the State through her responsible officials knowingly used the false testimony and aided in the perpetration in the fraud upon the Court to the great prejudice of the defendant, in that it deprived him of due process of law and the equal protection of the

law." (R. 22) The petition then goes on to allege: "The police were guilty of using perjury known to the prosecution and Court to aid in the conviction of the defendant Jennings, as can be shown by the transcript of proceedings had in Case 48-1247." (R. 22) In his application for writ of error to the Supreme Court of Illinois, the petitioner, again in a document prepared *pro se*, alleged: "Petitioner alleges that, he was denied due process and equal protection of the law through perjury and fraud known to and abetted by the prosecuting officials." (R. 4-5) There can be no doubt that these allegations stated a substantial claim of denial of federal right. *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213, 215-216.

But the petition did not stop at these general allegations which, had they stood alone, might have been dismissed on the ground that they were not supported by evidence sufficient to make out a prima facie case of deliberate presentation by the prosecution of perjured testimony. Cf. *Hysler* v. *Florida*, 315 U. S. 411, 421; *Schechtman* v. *Foster*, 172 F. 2d 339, 341. The petition went on to identify exactly the perjured testimony and to support the allegations by exhibits containing excerpts from the record. The allegations were, in brief, that one of the arresting officers testified at the preliminary hearing on motion to suppress illegally obtained evidence that no property had been taken from the petitioner at the time of his arrest; that the same officer testified at the trial before the jury that a ring, identified by another witness for the prosecution as part of the stolen loot, had been taken from the petitioner at the time of the arrest; and that the petitioner was thus deprived of a judgment by the trial court on the merits of the motion to suppress evidence later used against him (R. 23-24). The petition also alleged that this police officer did in fact take the ring from the petitioner.

We do not have here a situation where it is alleged that simply because a witness made contradictory statements during the course of the trial, there was perjured testimony about which the State's Attorney must have known. Cf. *Price* v. *Johnston*, 334 U. S. 266, 271, 288. Nor do we have a situation where a witness for the prosecution recants his testimony after the trial.[7] In such situations the credibility of the testimony has already been weighed by the jury and there is no necessary implication from the contradiction or subsequent recantation that the State's Attorney knew of the perjury, if it was committed. Here the statements were made by a police officer, himself a public official, who was working in close cooperation with the State's Attorney and whose credibility and conduct the jury had no reason to suspect. Only one of the statements was made before the jury so that their inconsistency could not be weighed in determining the credibility of the testimony, and although they were both made before the same judge, they were separated by more than four months and in entirely different contexts, so that there was no opportunity or necessity for choosing between them (R. 45, 66). Both directly and substantially aided the cause of the prosecution, and were made under circumstances rendering it difficult to believe that the State's Attorney was not fully aware that one of them was false, if indeed he was not the initiator of the entire scheme.

The foregoing suggestions are fully supported by the excerpts from the record attached to the petition. On the motion to suppress, Detective Piotter, after having placed

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[7] In these recantation cases the lower federal courts have customarily allowed full hearings in collateral proceedings, although the petitioners have seldom been able to prove their claims. Cf. *U. S.* v. *Ragen*, 158 F. 2d 346, *cert. den.* 331 U. S. 842; 173 F. 2d 668, *cert. den.* 337 U. S. 961. *Tilghman* v. *Hunter*, 167 F. 2d 661; *Sharpe* v. *Kentucky*, 142 F. 2d 215; *Brown* v. *Johnston*, 126 F. 2d 727.

Jennings in a particular apartment at the time of the arrest, testified as follows (R. 61):

> Q. Did you get any property, any personal property, in this apartment?
>
> A. Personal property, no, We didn't take anything that I know of. We didn't take anything.
>
> Q. You didn't get any personal property from there at all?
>
> A. I didn't, no.
>
> Q. Have you seen any personal property that was taken from that apartment?
>
> A. No.
>
> Q. Now, you went back, you say. Was Jennings sitting in the bathroom or was he standing in there or what?
>
> A. Standing. He was trying to get his clothes on, trying to dress.
>
> Mr. Brown [State's Attorney]: Your Honor, I object to any further questioning of this witness. If counsel is done searching now to get evidence to assist his defense, that is one thing.
>
> Mr. Geter: You don't know what I am searching for.
>
> Mr. Brown: Pardon me, do you mind? His witness is on the stand now. His witness has said he took nothing from that apartment, saw nothing taken from that apartment, and since then has seen nothing taken from that apartment. This is a motion to suppress . . .

At the time of the ruling on the motion to suppress, the following colloquy occurred between the Court and counsel (R. 136-137):

> The Court: . . . They took a watch from Rosanna but they gave it back to her. Then they went in and took rings from Evelyn Jackson right off her fingers. That's all they found when they arrested Jennings.
>
> Mr. Geter [Defendant's counsel]: That is what they testified. Of course, Jennings said he had a ring that they took, too, but they denied they took any ring from Jennings.

The Court: Jennings testified he was arrested about five-thirty in the morning in the bathroom and they took a watch and ring from him and rings from Miss Jackson. They searched the dwelling there and they had nothing. As far as taking the rings from the Jackson girl, this was not the dwelling house of Jennings.

Mr. Geter: He doesn't claim any interest in it and he had no interest in the rings.

The Court: As far as Jennings is concerned, there doesn't seem to be anything to suppress.

Mr. Geter: They took nothing from him, according to the police officer.

The Court: So that disposes of Jennings . . .

Counsel for Jennings then continued (R. 137):

> Mr. Geter: I would like for the Court to also find that there was no property taken from them [Smith and Jennings]. They contend there was some property taken *and I wouldn't want to be caught in the position of having them offer some property on the trial.* (Emphasis supplied.)

The Court, after stating that "it might be a question of property taken personally but there was nothing taken in any dwelling house" (R. 137), then proceeded to a discussion of the existence of an arrest warrant for co-defendant Morgan, from whom property had admittedly been taken at the time of his arrest (R. 47). The motion as to Morgan was continued for consideration of the lawfulness of the arrest and seizure, but as to Jennings the motion was denied forthwith.

The same State's Attorney who appeared at the preliminary hearing on the motion to suppress conducted the trial of the case before the jury. At that time this State's Attorney used the same witness to identify, as one of the exhibits which the state had prepared for use against the petitioner, the very ring which the State's Attorney had previously argued to the Court had never been taken from

Jennings (R. 66-67, 85). Even when, on cross-examination of this witness, the petitioner's counsel sought to bestir his sleeping conscience, the only response of the State's Attorney was to seize the opportunity to cement the identification of the ring as having been taken from Jennings (R. 118-119):

> Q. I believe you testified on direct examination that they got some jewelry from Jennings at 5306. Did you see any jewelry there?
>
> A. He was wearing a ring.
>
> Q. He was wearing a ring?
>
> A. That's right.
>
> * * * * * * *
>
> Q. Have you recalled all the time now that they said they got some jewelry from Jennings? You have known that all the time, haven't you?
>
> A. As I recall, they got a ring from Jennings.
>
> Q. Mr. Piotter, without looking at those tags, because I think they specifically state where all this business came from, would you pick out the ring that came from Jennings, without looking at the tag, sir?
>
> A. This one (handing item to counsel).
>
> Q. This is it?
>
> A. I believe so. I don't want to get too close to it.
>
> Q. And where is the jewelry you got from——
>
> Mr. Brown: (Interrupting) May we have the record show what he has picked out, Mr. Geter?
>
> Mr. Geter: He says he believes this is the ring.
>
> Mr. Brown: May we have the number?
>
> Mr. Geter: Yes, he has picked out People's Exhibit 8.
>
> Mr. Brown: May the record show that that has been identified as the ring taken from Jenning's room previously, your Honor?

There is only one inference that can be reasonably drawn from the facts presented by the petition and borne out by the excerpts from the record, namely that the State's

Attorney, fully aware of the false statement by the police officer on the motion to suppress, deliberately took advantage of those statements first to prevent the petitioner from obtaining the benefit of the Illinois rule providing for the suppression of illegally seized evidence before trial (*People* v. *Castree*, 311 Ill. 392) and then to present that very evidence at the trial as an essential link in the chain of evidence for conviction.

It is not here urged that the petitioner had a federal right to have the ring suppressed as evidence. Cf. *Wolf* v. *Colorado*, 338 U. S. 25. It is simply asserted that he was entitled to fair and above-board treatment in respect to the matter of the introduction of this evidence against him, just as he was so entitled with respect to the admission or exclusion of any evidence or the presentation of any defense. He did not receive such treatment because of the adept machinations of the prosecuting officials in using perjured testimony. His federal right to a fair trial was thereby violated, and the serious impact of this violation can readily be seen both from the fact that petitioner was effectively denied a hearing on his legitimate attempt to suppress this evidence and from the fact that the State's Attorney was so anxious to establish that the ring in evidence actually came from petitioner.

Even if the State's Attorney did not know at the time of the motion to suppress that this ring had been taken by the police officers from petitioner, the fact that he planned and prepared the use of this ring as evidence at the trial and thus knowingly took advantage of the police officer's false testimony for the purpose of submitting evidence at the trial which had been concealed from the court on the motion to suppress, should be enough to invoke the principles of *Pyle* and *Mooney*. Certainly he knew at the time of the admission of the evidence that its existence

had been concealed from the Court and that this concealment had in effect deprived the petitioner of a ruling on the merits of his motion for suppression, particularly since this very possibility had been pointed out to him by the petitioner's counsel at the hearing on the motion to suppress (R. 137). Such conduct is hardly calculated to satisfy the "public conscience . . . that fairness dominates the administration of justice." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279. In any event, the circumstances are certainly suspicious enough to give color to petitioner's allegation that the perjury was committed with full knowledge of the prosecuting officials and to entitle the petitioner to an opportunity to prove his allegations. The prisoner can hardly be expected to have direct proof of the State's Attorney's guilty knowledge, which ordinarily can only be inferred from surrounding circumstances. It was the proper function of a hearing, which the petitioner was denied, to determine whether the State's Attorney did in fact have the guilty knowledge toward which all the circumstances point.

Since petitioner has had no previous hearing on this particular issue, there clearly can be no principle of res judicata applicable here. *Cromwell* v. *County of Sac*, 94 U. S. 351; *Russell* v. *Place*, 94 U. S. 606. Furthermore, there has been no such real opportunity for hearing on this issue as might conceivably justify its foreclosure in post-conviction hearings on any grounds. At the time the first statement was made, on the motion to suppress, petitioner testified that a ring had been taken from him, but the police officer denied this, and the judge having no reason to anticipate the subsequent contradiction, accepted the police officer's word. When the second statement was made before the jury, there was no ground for objecting to it merely because inconsistent statements had been made at the

previous hearing. Nor could the inconsistency have been brought before the court and jury at that time in the guise of an objection to the admission of the ring as having been illegally seized. Under the local procedure, objection made at the trial on the ground that evidence should be suppressed as illegally seized is not welltaken. *People* v. *Castree*, 311 Ill. 392, 397-398. Conceivably the issue might have been presented on a motion for a new trial, but it was not and that is certainly not surprising. Presentation of the point would have required careful comparison of exactly what was said at the suppression hearing with the evidence given before the jury and it was not until considerably later that the petitioner was able to obtain the excerpts from the record upon which he now relies (R. 8, 63). Furthermore, a full exploration of the issue, as we have already indicated, requires not only consideration of the record, but also an opportunity to examine the State's Attorney to discover what explanation, if any, he might have for his apparent part in the two-faced performance of the prosecution.

In *Sunal* v. *Large*, *supra*, even though no constitutional claim was involved, the opinion of the Court took great pains to indicate that habeas corpus could not be substituted for appeal because appeal had in fact been available. Thus, the Court said:

> "The normal and customary method of correcting errors of the trial is by appeal. Appeals could have been taken in these cases, but they were not. It cannot be said that absence of counsel made the appeals unavailable as a practical matter. . . . Defendants had counsel. Nor was there any other barrier to the perfection of their appeals. . . . Moreover, this is not a situation where the facts relied on were dehors the record and therefore not open to consideration and review on appeal. . . . The error was of record in each case." (332 U. S. at 177).

In the present case, not only is a substantial constitutional issue involved, but, in addition, the issue was not presented and could not have adequately been presented at the trial, facts to some extent dehors the record must be investigated, and, as we have shown above, an appeal was not in reality available to this petitioner. Any one of the foregoing circumstances, to say nothing of their cumulative effect, should be enough to warrant a hearing on the merits of the perjury issue in the post-conviction proceedings.

Conclusion

Petitioner is entitled to a hearing on the merits of his allegations with respect to the use of coerced confessions and perjured testimony to secure his conviction. Because the Illinois Supreme Court, on the basis of a misconception of federal law, denied him such a hearing, its judgment should be reversed.

Respectfully submitted,

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APPENDIX A

An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted. Approved Aug. 4, 1949. Laws 1949, p. 722. Illinois Revised Statutes 1949, chap. 38, secs. 826-832; Smith-Hurd Illinois Annotated Statutes, chap. 38, secs. 826-832

§1. Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Act. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the state's attorney by any of the methods provided in Rule 7 of the supreme court. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceeding under this Act shall be commenced more than five years after rendition of final judgment, or more than three years after the effective date of this act, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

§2. The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and shall clearly set forth the respects in which petitioners' constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

§3. Any claim of substantial denial of constitutional

rights not raised in the original or an amended petition is waived.

§4. If the petition alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person. If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.

§5. Within thirty days after the filing and docketing of the petition, or within such further time as the court may fix, the State shall answer or move to dismiss. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in Rule 8 of the supreme court and section 46 of the Civil Practice Act.

§ 6. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper.

§7. Any final judgment entered upon such a petition may be reviewed by the supreme court on writ of error brought within six months from the entry of the judgment.

APPENDIX B

STATE STATUTORY PROVISIONS ON COST OF TRANSCRIPT

1. *States permitting indigent defendants in criminal proceedings to obtain without cost transcript of trial proceedings, or its equivalent, for purposes of appeal.*

Arizona: Ariz. Code Ann. (1939) 44-2525.

Arkansas: Ark. Stat. Ann. (1942) 22-357.

California: Deering's Civil Procedure and Probate Codes (1949) §274.

Connecticut: Conn. Gen. Stat. (1949) ch. 170, §3615; ch. 429, §8796 (Public Defender Statute. By letter from the Clerk of the Connecticut Supreme Court it was established that these provisions authorize the defendant to obtain the record without cost.)

Delaware: Del. Rev. Code (1935) ch. 108 §4246.

Florida: Fla. Stat. Ann. (1944) §924.23.

Idaho: Idaho Code (1948) §19-2402.

Indiana: Burns. Ind. Stat. (1946) §4-3511.

Iowa: Iowa Code Ann. (1950) 793.8.

Kentucky: Ky. Rev. Stat. (1948) §28.460.

Louisiana: La. Rev. Stat. 1950, Title 15, §555.

Massachusetts: Ann. Laws (1933) ch. 278, §33, §33(a).

Michigan: Mich. Stat. Ann. (1938) §27.341.

Mississippi: Miss. Code (1944) §1640.

Missouri: Mo. Rev. Stat. (1943) §13354.

Montana: Mont. Rev. Codes (1949) T. 93-1904.

Nebraska: Neb. Rev. Stat. (1948) §24-342.

Nevada: Nevada Stats. 1949, ch. 60.

New York: 66 McKinney's Cons. Laws (1945) Criminal Code, §456.

North Carolina: N. C. Gen. Stat. (1944) §7-89.

North Dakota: N. D. Rev. Code (1944) 27 :0606.

Ohio: Page's Ohio Gen. Code (1938) §1552.

Oklahoma: 20 Okla. Stat. (1937) §111.

Oregon: Ore. Comp. L. Ann. (1940) 93-276.

South Carolina: S. C. Code (1942) §596.

Tennessee: Williams' Tenn. Code (1934) §8819, §1108 (Letter of Clerk of Supreme Court of Tennessee indicates

that a defendant may appeal with a narrative bill of exceptions thus obviating the necessity of a stenographic record).

Texas: Vernon's Code of Crim. Procedure (1950) Art. 760.

Utah: Utah Code Ann. (1943) 21-0-8.

Virginia: Va. Code Ann. (1950) §8-330. (Letter of Clerk of Supreme Court of Virginia indicates that a defendant may appeal with a narrative bill of exceptions thus obviating the necessity of a stenographic record.)

Washington: Remington's Wash. Rev. Stat. (1932) §42-5.

Wisconsin: Wis. Stats. (1945) §252.20.

2. *States permitting defendants to obtain transcript without cost in special cases.*

Illinois: Smith-Hurd Ill. Ann. Stat. (1935) ch. 38, §769a. (Only when death penalty is imposed).

New Jersey: N. J. Stats. Ann.)1939) 2:195-22 (Only when conviction is for first degree murder and sentence is death).

Pennsylvania: 19 Purdon's Stat. (1930) §1232 (Only when conviction is for first degree murder).

Vermont: Ver. Stat. Rev. (1947) § 1421. (Only when sentence is death or imprisonment for ten years or more)

Note: We are indebted to Don H. Reuben, Student Editor of the Journal of Criminal Law and Criminology for laborious research underlying this Appendix. In each state when the statutory provision was not entirely clear, the practice thereunder has been established by correspondence with the clerk of the State Supreme Court.